Supreme Court, U.S.
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No. 90-1816

In The

Supreme Court of the United States

October Term, 1990

MSM FARMS, INC., a Nebraska Corporation,

Petitioner,

vs.

DON STENBERG, Attorney General,

Respondent.

and

EVERETT HOLSTEIN and RICHARD BARTEK,

Intervenors.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF OF RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

Respondent restates the Questions Presented as follows:

I.

Did the courts below correctly hold that Article XII, Section 8, of the Nebraska Constitution does not deprive petitioner of equal protection of the law as guaranteed by the Fourteenth Amendment to the United States Constitution?

II.

Did the courts below err as a matter of law in determining that Article XII, Section 8, of the Nebraska Constitution does not contravene the due process clause of the Fourteenth Amendment to the United States Constitution?

LIST OF PARTIES

Respondent accepts the petitioner's designation of parties to the proceeding in the Petition, with the exception of noting that Don Stenberg has succeeded Robert M. Spire in the office of Attorney General of the State of Nebraska. Pursuant to Rule 35.3 of this Court, Attorney General Stenberg has thus been substituted as the respondent in this action.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit, reported at 927 F.2d 330 (1991), is reprinted in the Appendix to the Petition. The opinion of the United States District Court for the District of Nebraska, dated January 19, 1990, which is unreported, is reprinted in the Appendix to the Petition.

JURISDICTION

The jurisdictional grounds are adequately stated in the Petition.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fourteenth Amendment to the United States Constitution and Article XII, Section 8, of the Nebraska Constitution. The text of pertinent portions of these constitutional provisions are reprinted in the Petition (Pet. Cert. 2-7).

STATEMENT OF THE CASE

Petitioner MSM Farms, Inc. [MSM], a Nebraska corporation, brought this action for declaratory and injunctive relief against the Attorney General of Nebraska. Petitioner sought preliminary and permanent injunctive relief to restrain the respondent and his office from enforcing the provisions of Article XII, Section 8 of the Nebraska Constitution, which prohibits non-family farm corporations from owning or operating Nebraska farm or ranch land. Petitioner also sought declaratory relief on the basis that Article XII, Section 8, violated the equal protection and due process clauses of the Fourteenth Amendment to the United States Constitution. The jurisdiction of the United States District Court for the District of Nebraska was invoked pursuant to 28 U.S.C. § 1331

(federal question), 28 U.S.C. § 2201 (declaratory judgment), and the Fourteenth Amendment (Pet. Cert. App. 12).

The district court, in a Memorandum of Decision dated January 19, 1990, held that Article XII, Section 8, did not violate the equal protection or due process clauses of the Fourteenth Amendment, and entered judgment for the Attorney General (Pet. Cert. App. 12-21). On appeal, the United States Court of Appeals for the Eighth Circuit affirmed the judgment of the district court (Pet. Cert. App. 1-11). With respect to MSM's equal protection claim, the Eighth Circuit determined the district court applied the proper standard in finding the prohibition of non-family corporate farming in Article XII, Section 8, was rationally related to a legitimate state interest (Pet. Cert. App. 2-8). The Eighth Circuit declined to decide petitioner's due process claim, as the issue sought to be presented on appeal was not decided by the district court (Pet. Cert. App. 9-10). With regard to the due process issue sought to be raised by MSM, the Court of Appeals did note that MSM purchased its farm land after the adoption of the non-family corporate farming prohibition and stated that "under such circumstances a court might be hard-pressed to find that MSM had not been 'afforded a fair opportunity to realize the value of the land' if divestiture [were] subsequently ordered" (Pet. Cert. App. 10).

REASONS FOR DENYING THE WRIT

The Petition does not present any grounds for granting certiorari as set forth in Rule 10 of the Rules of this Court. Respondent respectfully submits the Petition should be denied.

I. NO SPECIAL OR IMPORTANT REASONS EXIST FOR GRANTING THE WRIT.

Petitioner makes two arguments as to why this Court should accept this case and reverse the ruling of the United States Court of Appeals for the Eighth Circuit. First, petitioner contends the prohibition in Article XII, Section 8, against non-family corporate ownership or operation of farm or ranch land, violates the equal protection guarantee embodied in the Fourteenth Amendment to the United States Constitution. Second, petitioner contends the Court of Appeals erroneously failed to consider its due process claim, and that Article XII, Section 8, provides for an unlawful deprivation of property without due process in contravention of the Fourteenth Amendment. Neither question presented by petitioner involves an issue so special or important as to justify granting the writ.

A. MSM's Equal Protection Claim Does Not Warrant Review.

With respect to MSM's equal protection claim, the courts have universally upheld state enactments regulating and restricting the ownership of agricultural lands by certain types of corporations against challenges brought

on equal protection grounds. The seminal case on this issue is *Asbury Hospital v. Cass County*, 326 U.S. 207 (1945), in which this Court directly rejected an equal protection challenge to a state prohibition on corporate ownership of farm land. In *Asbury Hospital*, the Court considered a North Dakota corporate farming statute which provided that corporations holding land "used or usable for farming or agriculture" at the time of the statute's enactment were required to divest such lands within ten years, except for those lands "reasonably necessary in the conduct of their business." *Id.* at 209. The North Dakota statute contained exceptions from the divesture requirement for lands owned and held by corporations engaged in the business of dealing in farm lands and for lands belonging to cooperative corporations, seventy-five percent of whose members or stockholders were farmers residing on farms or depending principally on farming for their livelihood. *Id.* at 214. In rejecting the hospital's contention that the exceptions for corporations in the business of dealing in farm lands and cooperative corporations resulted in a denial of equal protection, this Court stated:

> We cannot say that there are no differences between corporations generally and those falling into the excepted classes which may appropriately receive recognition in the legislative application of a state policy against the concentration of farming lands in corporate ownership.

Id.

In addition to the decisions rendered by the courts below, the highest courts of two states have relied on the

Court's opinion in *Asbury Hospital* to sustain the constitutionality of restrictions on corporate ownership and operation of agricultural lands. *Omaha Nat'l Bank v. Spire*, 223 Neb. 209, 230-32, 389 N.W.2d 269, 282-83 (1986) (upholding validity of Neb. Const. Art. XII, Section 8, on equal protection grounds); *State ex rel. Webster v. Lehndorff Geneva, Inc.*, 744 S.W.2d 801, 805-06 (Mo. 1988) (upholding against equal protection challenge Missouri statute prohibiting corporations other than "authorized" or "family farm" corporations from engaging in farming or obtaining any interest in agricultural land). The definition of "family farm corporation" involved in *State ex rel. Webster v. Lehndorff Geneva, Inc.*, requiring that at least one-half of the stockholders be members of a family related to one another in a specified manner and that at least one person having an ownership interest be involved in exercising management control or direction, is very similar to the definition of "family farm or ranch corporation" in Article XII, Section 8. 744 S.W.2d at 805n.3. In upholding the constitutionality of the Missouri statutory scheme, the Missouri Supreme Court stated:

> The effect of the statute, which forms the rational basis for the classification established, is to prevent the concentration of agricultural land, and the production of food therefrom, in the hands of business corporations to the detriment of traditional family units and corporate aggregations of natural persons primarily engaged in farming. Thus, large publicly held corporations are prevented from acquiring and operating large tracts of farmland. The legislature apparently believed that the superior financial and other business resources of these corporations would have a detrimental effect on traditional farming entities. This is because the cyclical

> nature of the farming industry periodically causes depressed markets and losses which large, diversified corporations are better able to sustain. Thus the traditional farming entities would operate at a competitive disadvantage.

Id. at 805.

Citing this Court's decision in *Asbury Hospital* and the Nebraska Supreme Court's decision in *Omaha Nat'l Bank v. Spire*, the Missouri Supreme Court concluded:

> It is within the province of the legislature to enact a statute which regulates the balance of competitive economic forces in the field of agricultural production and commerce, thereby protecting the welfare of its citizens comprising the traditional farming community, and such statute is rationally related to a legitimate state interest.

744 S.W.2d at 806.

The Court of Appeals properly relied on these precedents in concluding that the policy underlying passage of the initiative amendment in Nebraska was rationally related to a legitimate state interest, recognizing that the constitutional provision "sought to retain and promote family farm operations in Nebraska and sought to prevent a perceived threat that would stem from unrestricted corporate ownership of Nebraska farm land by preventing the concentration of farmland in the hands of non-family corporations." (Pet. Cert. App. 6).

The gist of petitioner's equal protection claim is that the exception for a "family farm or ranch corporation" is not rationally related to the purpose served by the constitutional provision. Petitioner's focus on the family relationship requirement, as if otherwise unrestricted, does

not accurately characterize the full impact and purpose of the amendment. MSM completely disregards the other component, equally as important to the concept of the family farm, that at least one family member must be "residing on or actively engaged in the day to day labor and management of the farm." Thus, like the North Dakota statute which this Court found constitutional in *Asbury Hospital*, Article XII, Section 8 fosters (and, in fact, mandates) contact and involvement with the farm operation – thereby discouraging the detrimental impact of corporate absenteeism.[1]

It is beyond dispute that the classification of a "family farm or ranch corporation" is rationally based and serves the legitimate state interest promoted by the constitutional provision. The classification recognizes that a farm or ranch family may wish to incorporate to limit liability, to provide for business continuity, or for estate planning reasons. Several states which otherwise restrict corporate involvement in agriculture specifically define family farm corporations as exceptions to the general prohibition. In addition to Nebraska, the states of Iowa, Kansas, Minnesota, Missouri, and South Dakota have established exceptions for family farm corporations

[1] The Court of Appeals specifically noted the rational basis for this requirement by commenting on how MSM embodies the problems endemic to corporate farming in that neither of its two incorporators lived in or near the farm land purchased by MSM, one had never even seen the land, and the other had limited knowledge of its location and characteristics (Pet. Cert. App. 7-8).

permitting these entities to engage in farming.[2] Like the Nebraska exception, these definitions typically require that the corporation's shareholders be related within specified degrees of consanguinity and that at least one stockholder either reside on the farm or be actively engaged in the management of the farm operation.[3] The purpose of the prohibition against non-family corporate ownership and operation of farm or ranch land in Article XII, Section 8, is to preserve an agriculture where families own and work the land. The Court of Appeals correctly held that this constitutes a legitimate state purpose, and that the exception for family farm or ranch corporations under the Nebraska constitutional provision is rationally related to the furtherance of this purpose. MSM's equal protection challenge to the provision is wholly without merit.

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[2] Iowa Code Ann. § 172C.1.8 (West 1990); Kan. Stat. Ann. § 17-5903(j) (1988); Minn. Stat. § 500.24(2)(c) (1990); Mo. Ann. Stat. § 350.010(5) (Vernon 1991); S.D. Codified Laws Ann. § 47-9A-14 (1983).

[3] For example, Mo. Ann. Stat. § 350.010(5) defines a family farm corporation, in part, as one

> . . . incorporated for the purpose of farming and the ownership of agricultural land in which at least one-half of the voting stock is held by and at least one-half of the stockholders are members of a family related to each other within the third degree of consanguinity or affinity including the spouses, sons-in-law and daughters-in-law of any such family members according to the rules of the common law, and at least one of whose stockholders is a person residing on or actively operating the farm, ...

In sum, MSM's equal protection claim presents no substantial or important question necessitating review by this Court. MSM has not demonstrated that any conflict exists among the circuit courts on the issue presented, nor has petitioner shown that any conflict between the decision of the Court of Appeals and any state court of last resort exists. Indeed, the only decisions rendered on this issue support the Eighth Circuit's holding that the restrictions in Article XII, Section 8, on non-family corporate ownership and operation of farm or ranch lands do not violate the equal protection clause. Accordingly, the Court should decline to grant review of MSM's equal protection claim.

B. MSM'S Due Process Claim Is Not Properly Before The Court.

MSM also requests the Court to consider its claim that Article XII, Section 8, violates the due process clause because it contains a provision requiring corporations unlawfully owning farm or ranch land to divest themselves of such land within two years after the state has obtained a court order requiring divestment. Petitioner now claims that the portion of Article XII, Section 8, providing that land may be escheated to the state if the corporation fails to divest land subject to a court order of this nature within this two year period, results in an unlawful deprivation of property without due process. (Pet. Cert. 18-20). The Court should decline consideration of this question for several reasons.

"Ordinarily, this Court does not decide questions not raised or involved in the lower court." *Youakim v. Miller,*

425 U.S. 231, 234 (1976); *Adickes v. Kress & Co.*, 398 U.S. 144, 147n.2 (1970). It is apparent in this case that MSM did not present this question to the district court, and that, accordingly, the Court of Appeals declined to decide this due process issue on appeal. (Pet. Cert. App. 9-10). It is true the Eighth Circuit did note that MSM purchased its farmland after the adoption of the non-family corporate farming prohibition and stated "that under such circumstances a court might be hard-pressed to find that MSM had not been 'afforded a fair opportunity to realize the value of the land' if divesture [were] subsequently ordered." (Pet. Cert. App. 10). Neither the district court nor the Court of Appeals, however, decided the question which MSM now requests this Court to review. Under the Court's long-standing policy of declining to consider questions not raised in or decided by the lower courts, MSM's request for review of this issue should be denied.

Furthermore, a serious question exists as to whether MSM's due process claim presents a justiciable case or controversy. Relief under the Declaratory Judgment Act is available only when an "actual controversy" is presented. 28 U.S.C. § 2201. In addition, federal courts are constitutionally limited to deciding "cases or controversies." U.S. Const. art. III, § 2, cl. 1. While there is no question that respondent may bring an action to obtain an order directing MSM to divest its farmland for violation of the amendment, it is completely hypothetical as to whether or not MSM would be able to divest itself of the land over the two year period provided under the amendment for a fair return if such an order were obtained.

Under the circumstances present in this case, it would be inappropriate for the Court to address whether

the provision for escheatment of land not divested within two years of the issuance of a court order pursuant to Article XII, Section 8, could violate the guarantee of due process, as it is clear this provision has not been applied to MSM. Indeed, it is purely speculative as to whether it may ever be applied to MSM, as no actual controversy would exist unless and until MSM were subject to an order of divestment, and was unable to divest itself of the land within the two year period provided under the amendment. Respondent submits it would be improvident to grant a writ of certiorari to review the due process claim sought to be presented by MSM on this record.

Finally, it is evident that various decisions of this Court support the constitutionality of the divestiture procedure contained in Article XII, Section 8, against an attack on due process grounds. In upholding the validity of the North Dakota divestiture provision at issue in *Asbury Hospital* against a due process challenge, the Court stated:

> The due process clause does not guarantee that a foreign corporation when lawfully excluded as such from ownership of land in the state shall recapture its cost. It is enough that the corporation, in complying with the lawful command of the state to part with ownership, is afforded a fair opportunity to realize the value of the land, and that the sale, when required, is to be under conditions reasonably calculated to realize its value at the time of sale.

Asbury Hospital, 326 U.S. at 212-13.

As the Eighth Circuit noted, "MSM purchased its farm land well after voters had adopted the corporate farming prohibition, and that under such circumstances a

court might be hard-pressed to find that MSM had not been 'afforded a fair opportunity to realize the value of the land' if divestiture [were] subsequently ordered." (Pet. Cert. App. 10) (*citing Asbury Hospital*, 326 U.S. at 212) (footnote omitted). The two year divestment period provided under Article XII, Section 8, is a reasonable time to permit a corporate violator to find a willing buyer, particularly since the corporation would know or should know of the law's requirements. *See also State ex rel. Webster v. Lehndorff Geneva, Inc.*, 744 S.W.2d at 808 (upholding against due process challenge two year divestment period under Missouri statute banning non-family corporate ownership or operation of agricultural land).

In addition, the Court has upheld the power of a state to permit or even require interests in property to revert to another after the passage of time, *Texaco, Inc. v. Short*, 454 U.S. 516, 527-28 (1982), and has affirmed the power of a legislative body to impose an affirmative duty on the *legal* owner of a property interest and, upon failure to comply with newly imposed requirements (with adequate notice), the authority of such body to extinguish those property rights without compensation. *United States v. Locke*, 471 U.S. 84, 104-110 (1985). Any property loss through escheatment which *may* result to a corporation violating Article XII, Section 8, would be due first to the corporation's unlawful acquisition or engagement in the prohibited activity, and second, to its neglect to dispose of the property within the two year period provided after divestment is ordered by a court. The amendment clearly provides a corporation violating its prohibitions with adequate due process protections.

CONCLUSION

As the Court of Appeals stated in its opinion, "[t]he people of Nebraska have made a reasonable judgment that prohibiting non-family corporate farming serves the public interest in preserving an agriculture where families own and farm the land." (Pet. Cert. App. 10). While the provisions of Article XII, Section 8, of the Nebraska Constitution, represent an important public policy determination made by the people of Nebraska, the constitutional attacks raised by MSM do not present any substantial or important questions necessitating review by this Court. Accordingly, the Petition for Writ of Certiorari should be denied.

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